

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

PERMA-FIX NORTHWEST RICHLAND,  
INC., a Washington Corporation,

Plaintiff,

v.

ECOLOGY SERVICES, INC., a foreign  
corporation,

Defendant.

No. CV-06-5013-FVS

ORDER DENYING DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT

Before the Court is Defendant's motion for summary judgment. (Ct. Rec. 205). Plaintiff is represented by Diehl R. Rettig and Gregory C. Bowers. Defendant is represented by Richard D. Campbell, Steven K. Fedder, and Andrew L. Cole.

**BACKGROUND**

On July 1, 1998, ATG Richland Corporation ("ATG") entered into a contract with Defendant Ecology Services, Inc. ("ESI"). (Ct. Rec. 1 ¶ III). Pursuant to this contract, ATG processed and disposed of waste for ESI, and ATG invoiced ESI for the amount of \$1,171,190.12. In the instant action, Plaintiff alleges that ESI still owes \$499,894.41<sup>1</sup> under the ATG/ESI contract.

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<sup>1</sup>Plaintiff initially alleged in its complaint and earlier motion for summary judgment that Plaintiff was entitled to an award of \$589,257.51, plus interest. (Ct. Rec. 1 ¶ VI; Ct. Rec. 43). However, Plaintiff's later briefing agreed that ESI's credit memo in the amount of \$89,363.10 (Ct. Rec. 68, Ex. 2) was valid. (Ct. Rec. 110 at 2). Plaintiff thus conceded that, based on ESI's credit memo, the net principal balance due is \$499,894.41, not \$589,257.51 as originally alleged. (Ct. Rec. 110).

1 On December 3, 2001, ATG filed for bankruptcy. On August 5,  
2 2003, the bankruptcy court approved the sale of ATG's Richland  
3 facility, license, and brokered waste to Pacific EcoSolutions, Inc.<sup>2</sup>  
4 ("Plaintiff").

5 On March 8, 2004, the bankruptcy trustee filed an adversary  
6 proceeding in the bankruptcy court against ESI. The trustee asserted  
7 rights under the ATG/ESI contract to attempt to force ESI to remove  
8 ESI's brokered waste from the Richland facility purchased by  
9 Plaintiff. On April 27, 2004, ATG's Chapter 11 bankruptcy was  
10 converted to a Chapter 7 bankruptcy. On April 28, 2005, ESI filed a  
11 motion for summary judgment in its adversary proceeding against the  
12 trustee in the bankruptcy proceeding. ESI argued the trustee lacked  
13 standing to enforce the ATG/ESI contract because the trustee had no  
14 further obligations to perform with respect to the waste. ESI  
15 asserted that since the Richland facility, license, and waste had been  
16 transferred to Plaintiff, the trustee no longer had possession of or  
17 interest in the waste. On June 13, 2005, the bankruptcy court agreed  
18 with ESI and determined that the trustee lacked standing.  
19 Accordingly, the bankruptcy court granted ESI's motion for summary  
20 judgment.

21 The trustee thereafter executed an assignment of contract  
22 transferring to Plaintiff all rights, title, and interest held by ATG  
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24 <sup>2</sup>On July 13, 2007, Pacific EcoSolutions, Inc., changed its  
25 name to Perma-Fix Northwest Richland, Inc. (Ct. Rec. 41). For  
26 purposes of this order, all references to Plaintiff shall refer  
to both Pacific EcoSolutions, Inc., and Perma-Fix Northwest  
Richland, Inc., as the entity is one in the same.

1 in the ATG/ESI contract. On February 13, 2006, Plaintiff filed a  
2 complaint in this Court against ESI to recover the alleged outstanding  
3 balance of the contract. (Ct. Rec. 1).

#### 4 DISCUSSION

##### 5 I. LEGAL STANDARD

6 Summary judgment is appropriate only if "there is no genuine  
7 issue as to any material fact and . . . the moving party is entitled  
8 to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A material  
9 fact is one "that might affect the outcome of the suit under the  
10 governing law[.]" *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248,  
11 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). A fact may be considered  
12 disputed if the evidence is such that the fact-finder could find that  
13 the fact either existed or did not exist. See *id.* at 249, 106 S.Ct.  
14 at 2511 ("all that is required is that sufficient evidence supporting  
15 the claimed factual dispute be shown to require a jury . . . to  
16 resolve the parties' differing versions of the truth" (quoting *First*  
17 *National Bank of Arizona v. Cities Serv. Co.*, 391 U.S. 253, 288-89, 88  
18 S.Ct. 1575, 1592, 20 L.Ed.2d 569 (1968))).

##### 19 II. ANALYSIS

20 Defendant contends that Plaintiff has no rights under the ATG/ESI  
21 contract because it was expressly rejected by the trustee pursuant to  
22 the terms of the Notice of Motion and Sale Approval Order. Defendant  
23 further alleges that even if the trustee did not expressly reject the  
24 ATG/ESI contract, the contract was deemed rejected when the trustee  
25 did not accept it within 60 days of the bankruptcy court's order  
26 converting the bankruptcy to Chapter 7. Defendant asserts that in

1 either case, ATG had no contract rights to convey to Plaintiff;  
 2 therefore, summary judgment should be entered in favor of Defendant.  
 3 (Ct. Rec. 195-3). Under both theories, Defendant cites to Section 365  
 4 of the United States Bankruptcy Code. (Ct. Rec. 195-3). Section 365  
 5 addresses executory contracts and unexpired leases. 11 U.S.C. § 365.

6 Plaintiff responds that no evidence has been presented which  
 7 demonstrates the ATG/ESI contract was expressly rejected, and, in any  
 8 event, 11 U.S.C. § 365 is inapplicable in this case because the  
 9 ATG/ESI contract was not an "executory contract." (Ct. Rec. 198).

#### 10 **A. EXECUTORY CONTRACT**

11 Whether the ATG/ESI contract was an "executory contract" is an  
 12 issue central to Defendant's motion for summary judgment. If the  
 13 ATG/ESI contract was not an executory contract, 11 U.S.C. § 365 is not  
 14 applicable and Defendant's motion is without merit.

15 The term "executory contract" is not defined in the Bankruptcy  
 16 Code. However, the legislative history of Section 365 provides that  
 17 contracts are executory if "performance remains due to some extent on  
 18 both sides." Notes of Committee on the Judiciary, Senate Report No.  
 19 95-989, U.S. Code Cong. & Admin. News 1978, pp. 5787, 5844; *see also*  
 20 *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 522 n. 6, 104 S.Ct. 1188,  
 21 1194 n. 6, 79 L.Ed.2d 482 (1984). This definition is similar to the  
 22 often cited "Countryman definition" of executory contract:

23 [A] contract under which the obligation of both the bankrupt and  
 24 the other party to the contract are so far unperformed that the  
 25 failure of either to complete the performance would constitute a  
 material breach excusing the performance of the other.

26 Countryman, "Executory Contracts in Bankruptcy: Part I," 57

1 Minn.L.Rev. 439, 460 (1973); see *In re Sigel & Co., Ltd.*, 923 F.2d 142  
2 (9th Cir. 1991); *In re Wegner*, 839 F.2d 533 (9th Cir. 1988); *In re*  
3 *Pacific Exp., Inc.*, 780 F.2d 1482, 1487 (9th Cir. 1986). Under the  
4 "Countryman definition" a contract is executory only if substantial  
5 performance remains due on both sides.

6 If the contract is an option contract, where one party's  
7 performance is conditioned upon the other party exercising the option,  
8 the Ninth Circuit has held that the Court must look to outstanding  
9 obligations at the time the petition for relief is filed and ask  
10 whether both sides must still perform. *In re Robert L. Helms Constr.*  
11 *& Dev. Co.*, 139 F.3d 702, 706 (9th Cir. 1998). "Performance due only  
12 if the optionee chooses at his discretion to exercise the option  
13 doesn't count unless he has chosen to exercise it. . . . The question  
14 thus becomes: At the time of filing, does each party have something  
15 it must do to avoid materially breaching the contract? Typically, the  
16 answer is no; the optionee commits no breach by doing nothing." *Id.*

17 Here, viewing the facts presented in a light most favorable to  
18 the nonmoving party and considering the above definitions, the ATG/ESI  
19 contract was not executory. The ATG/ESI contract conditioned ATG's  
20 duty to process and dispose waste on ESI paying ATG for the service.  
21 The contract required ESI to pay ATG 30 days from the date of ATG's  
22 invoices, permitted ATG to demand cash-on-delivery or to suspend  
23 performance until paid in full, and gave ATG 90 days to process the  
24 waste and additional time for disposal. On the date ATG filed  
25 bankruptcy, December 3, 2001, ESI allegedly owed ATG \$589,257.51, plus  
26 interest, under the ATG/ESI contract. Because ATG's obligations were

1 conditioned solely on ESI paying and it is undisputed that ESI had not  
2 paid some of the invoices, ATG had no obligations under the ATG/ESI  
3 contract. Since ESI had failed to pay ATG, ATG would not have  
4 materially breached the contract by failing to process the waste.  
5 Based on these facts, the Court finds that the ATG/ESI contract was  
6 not an executory contract within the meaning of Section 365 of the  
7 Bankruptcy Code on the date the bankruptcy was filed. Consequently,  
8 11 U.S.C. § 365 is inapplicable in this case.

9 **B. EXPRESS REJECTION OF ATG/ESI CONTRACT**

10 Defendant argues that because the ATG/ESI contract was expressly  
11 rejected by the trustee, the December 22, 2005, assignment of the  
12 ATG/ESI contract to Plaintiff was a nullity. (Ct. Rec. 195-3 at 5-7).  
13 Defendant specifically asserts that, on August 5, 2003, a court order  
14 authorizing and approving the sale of ATG's Richland assets to  
15 Plaintiff "authorized the Trustee to reject certain ATG executory  
16 contracts." (Ct. Rec. 195-4 ¶ 9). Defendant claims that the trustee  
17 "expressly rejected" the ATG/ESI contract because it was included  
18 within the group of "remaining executory contracts and leases related  
19 to the Purchased Assets." Defendant asserts that ATG's rejection of  
20 the ATG/ESI contract took effect on September 13, 2003, the date and  
21 time of closing the sale of the purchased assets with Plaintiff. (Ct.  
22 Rec. 195-3 at 6).

23 Viewing the facts presented in a light most favorable to the  
24 nonmoving party, Defendant's argument fails for two reasons. First,  
25 as discussed above, the ATG/ESI contract was not an executory  
26 contract. Second, as asserted by Plaintiff, at most, the court order

1 at issue "authorized" the trustee to reject contracts; however, there  
2 is no court order, filing by the trustee, letter from the trustee,  
3 letter from a representative of ATG, or other evidence demonstrating  
4 an actual rejection of the ATG/ESI contract. (Ct. Rec. 198 at 5-6).  
5 Defendant has simply not shown that the trustee exercised his alleged  
6 authority to reject the ATG/ESI contract.

7 **C. FAILURE TO ASSUME CONTRACT**

8 Defendant next asserts that even if the ATG/ESI contract was not  
9 expressly rejected, ATG rejected the contract by failing to assume it  
10 within the time proscribed by 11 U.S.C. § 365(d)(1). (Ct. Rec. 195-3  
11 at 7-8). Defendant contends that ATG is deemed to have rejected the  
12 ATG/ESI contract on June 26, 2004, because the trustee failed to  
13 expressly assume it within 60 days of the conversion order entered on  
14 April 27, 2004. *Id.* Defendant thus argues that the contract was  
15 rejected by operation of law.

16 Section 365(d)(1) of the Bankruptcy Code provides that "[i]n a  
17 case under chapter 7 of this title, if the trustee does not assume or  
18 reject an **executory contract** . . . within 60 days after the order for  
19 relief . . . then such contract . . . is deemed rejected." 11 U.S.C.  
20 § 365(d)(1) (emphasis added).

21 As discussed above, viewing the facts presented in a light most  
22 favorable to the nonmoving party, the ATG/ESI contract was not  
23 executory and, therefore, Section 365 of the Bankruptcy Code is not  
24 applicable. Accordingly, Defendant's argument in this regard fails.

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1 Based on the foregoing, **IT IS HEREBY ORDERED** as follows:

2 1. Defendant's motion for summary judgment (**Ct. Rec. 205**) is  
3 **DENIED**.

4 2. This matter shall proceed to trial on the merits. At trial,  
5 the burden rests upon Defendant to show by a preponderance of the  
6 evidence that payment, as promised, was provided for the work  
7 ultimately performed pursuant to the contract. *West Coast Credit*  
8 *Corp. v. Pedersen*, 64 Wash.2d 33, 34-36, 390 P.2d 551 (1964); (Ct.  
9 Rec. 143).

10 **IT IS SO ORDERED.** The District Court Executive is hereby  
11 directed to enter this order and furnish copies to counsel.

12 **DATED** this 12th day of June, 2009.

13 S/Fred Van Sickle  
14 Fred Van Sickle  
15 Senior United States District Judge  
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